85-704

No. 85-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HUBERT CALL and RUTH CALL,
Petitioners,

v.

City of Albany, California; Interstate General Corporation; Interstate General Development, Inc.; Interstate Albany Corporation; Cebert Properties, Inc.; BRUCE THOMSON, ROBERT SCHARF, DARIO C. MENIKETTI, LOUIS H. BELL, JERRY J. LEAHY, THELMA RUBIN, BLANCHE VRANNA, ROBERT B. ELLIOTT, and CATHERINE J. WEBB, residents and taxpayers of the City of Albany, California,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Is the Due Process clause of the Fourteenth Amendment violated by a state conflict of interest statute whose operative term is not statutorily defined and which, upon application, works a $500,000 forfeiture upon a City Councilman?

2. Is the Establishment Clause of the First Amendment violated when a civic park is burdened with a Christian cross?

PARTIES TO THE PROCEEDINGS

HUBERT CALL and RUTH CALL,

Petitioners,

v.

City of Albany, California; Interstate General Corporation; Interstate General Development, Inc.; Interstate Albany Corporation; Cebert Properties, Inc.; BRUCE THOMSON, ROBERT SCHARF, DARIO C. MENIKETTI, LOUIS H. BELL, JERRY J. LEAHY, THELMA RUBIN, BLANCHE VRANNA, ROBERT B. ELLIOTT, and CATHERINE J. WEBB, residents and taxpayers of the City of Albany, California,

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v.

CITY OF ALBANY, CALIFORNIA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioners, HUBERT CALL and RUTH CALL, hereby respectfully request that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of California entered on May 23, 1985 with rehearing denied on July 29, 1985.

OPINION BELOW

The decision of the California Supreme Court is reported at 38 Cal.3d 633, 214 Cal.Rptr. 139 (1985) and appears as Appendix 1a-25a in its unchanged form after denial of rehearing.

JURISDICTION

This petition for certiorari is taken from a judgment entered on May 23, 1985, by the Supreme Court of the

State of California. A timely petition for rehearing was denied on July 29, 1985.

The statutory provision believed to sustain the jurisdiction of this Court is set forth in 28 U.S.C. section 1257, which provided in relevant part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) * * *
>
> (2) * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution treaties or statutes of, or commission held or authority exercised under, the United States.

STATUTES AND AMENDMENTS INVOLVED

Cal. Gov. Code section 1090, which provided as follows:

> Members of the legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.
>
> As used in this article, "district" means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

U.S. Const. Amend. I, which provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise, thereof, * * *

U.S. Const. Amend. XIV, section 1, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a taxpayer's suit in which the trial court found that, while no intentional wrongdoing occurred, City Councilman HUBERT CALL and his wife, RUTH CALL, were required to forfeit all the proceeds of a sale of land by them to a real estate developer. The fee to that land was given by the developer to the City of Albany, together with two other parcels to form a 7½-acre park at the top of Albany Hill.

The Albany Lions Club, Lions International own a 21-foot cross that stood on CALL's land at his pleasure before the sale. Councilman CALL asked the developer to protect that cross, and with little concern for the "establishment" clause problem which would be created by giving a California chartered city a park surrounding a huge cross, the developer allowed a deed of easement to be recorded "for ingress and egress to maintain the existing cross." The Lions Club is the grantee of that easement. Long

before that deed was given they had conducted Christian religious services at the foot of that cross. These services continue to the present throughout the 11 years that the park has existed. The Lions also illuminate their cross throughout the Christmas and Easter seasons and as a vigil light in times of need. During the Iranian hostage crisis it remained lit continuously.

The developer's gift of this park grew out of an offer he made to the city to give them either a park on the edge of Cerrito Creek or a park at the top of Albany Hill to be assembled by the developer using $600,000 of the developer's money, but not both. In return for that choice between two park alternatives the developer obtained the various permits needed to construct a 2,500-unit apartment complex at the southwestern base of Albany Hill adjacent to Highway 80. The resulting Gateview Apartments now provide 10% of the tax revenue of Albany, and if the project had been fully built, about 25% of the city's revenue would be due to that huge complex.

In view of the financial risk that massive development presented to the banks, it was the lender's requirement that land at the top of the hill zoned for multiple dwelling development be made unbuildable. The developer planned to acquire that land at a cost of about $1 million. (R.T. 706) When the city fathers selected the hilltop park option, the developer was given absolute discretion concerning which land he could buy. The 200′ meridian which is the lower limit of the permissible purchase includes land of various owners below Taft Street and three principal owners plus the developer above Taft Street. The most logical choice for the park included land owned by a family corporation called "Golden Gate Hills Development Corporation." Had that parcel been acquired it would have satisfied the $600,000 plan requirements, and the CALL

lands with the Lions Club's cross would have been left out of the park. When the city accepted the $600,000 park plan (as opposed to the Creekside Park) Councilman CALL abstained from voting and debating. He had been advised to abstain by the city attorney because his land was within the 200′ level, and it could have been purchased.

The $600,000 plan provided that if the developer could not get the land he wanted by negotiation, he would give the unspent funds to the city *earmarked* for acquisition of land for a park, with the city to exercise its eminent domain power to acquire the land. The CALL land is located in an area master planned for a future park.

Neither alternative required the CALL lands would be acquired.

The trial judge observed on January 11, 1978 that the City had absolutely no contractual right to demand that the developer buy the CALL lands to perform his contract:

> Now, with Exhibit 4 and Exhibit 7 (the developer's two November, 1972 letters) and Exhibit 24 we have an agreement between the City and IGC. Thereafter, as the evidence reveals, everything that was done was done in accordance with and pursuant to that agreement. If the City had attempted to guide IGC in how it expended the $600,000, the City would have been breaching the agreement.
> (R.T. 560, line 27 to 561, line 4.)

The developer's secret intention was to use the $600,000 gift plan as an anti-competition tool backed by the City's power of condemnation to coerce the owners to land zoned for multiple dwellings to sell to him at a discount price. Giving various land to the city was incidental to him. The important value to him was to eliminate land which could

be developed in competition with his huge project. When Councilman CALL asked to have the Lions Club's cross protected, the developer agreed. He testified that he did not care if the city refused to take that land—he'd keep it himself. (R.T. 691, 705, see findings 33 and 46) His concern was to forbid competitive development.

The land he gave to the city was *not the same* as the land he bought! It must be remembered that all the land the developer bought was zoned for multiple dwelling development. Before giving the city hollow legal titles to the ground, the developer stripped *all* the land in the $600,000 plan of all development rights. From a business point of view, the only value to land is the *right to build.* The developer gave the city land which had been shorn of the right to build. The CALL property was covered with a religious easement imposed on *each* of the 18 lots within that purchase (Exhibit H). The other property given to the city was subjected to a right of reverter if the city attempted to build *anything* on it for 99 years. Exhibit 7 (the developer's letter of November 12, 1972) and page 3 of the conditions of his purchase attached to the letter spell out a covenant running with the land that forbids all use other than park use for 99 years:

> THE COURT: . . . [T]hat $600,000 would never have been available and would never have become funds of the City of Albany had the City not accepted the conditions which were attached to it, and the City did accept those conditions through the actions of the City Counsel at the meeting of November 13th, as reflected in Exhibit 24 minutes of that meeting. (R.T. 560)

CALLS' ownership of this land had been well publicized. For example, in the spring of 1972, Catherine Webb (one of the plaintiffs here) conducted a public

gathering and "walk on Albany Hill" which attracted a large crowd. (R.T. 572) City Councilman HUBERT CALL pointed out his land to his group. (R.T. 573) Later that year, the "Overlook Park" idea was brought before the Albany City Council. Again, Mr. CALL publicly announced his holding on the Hill. (R.T. 542) The park was proposed by Ruth Meniketti, wife of another plaintiff here (R.T. 542, also see defendant IGC's Exhibits D and F) following a study by the Park and Recreation Committee that had been going on since 1971. (R.T. 8, Finding 12) The plaintiff group attended City Council meetings regularly, and they conspicuously followed this project. (R.T. 94-95) It was their practice to point out that Councilman CALL owned land on Albany Hill whenever the Hill was discussed by the City Council. (R.T. 246)

Mr. CALL likewise took every occasion to discuss his land ownership on the record of City Council meetings. (See R.T. 245 beginning at line 28):

> Q. And frequently as the various matters came up, where Councilman CALL felt potentially that his property might be involved, he would speak up publically, would he not?
>
> A. He brought that forward many times, that's right.
>
> Q. And at these meetings the general public is invited, isn't that true?
>
> A. Yes.

The City Attorney discussed the disclosures at page 447 and 448, (See 448 1 12 et seq.) and quoted the councilman:

> Q. Now, according to your own recollection of the City Council minutes, did Mr. CALL raise any ques-

tions as to the propriety of his participating in any such discussion or any vote on that plan?

A. Yes, as I indicated before, that the CALL property was involved and that's why I felt that it was the Hill property, Overlook Park, and he asked whether or not he could vote and I said no.

Q. He also asked, did he not, whether or not he could participate at all in the discussions?

A. I think my advice was that he should not.

Q. And that is reflected, is it not, in the minutes there of August 28th?

A. Yes.

REASONS FOR GRANTING THE WRIT

I. CALIFORNIA GOVERNMENT CODE SECTION 1090 GOVERNING CONFLICT OF INTEREST SITUATIONS IS UNCONSTITUTIONALLY VAGUE ON ITS FACE.

It is well established that civil statutes may be invalidated if they are found to be unconstitutionally vague. *Small Co.* v. *American Sugar Ref. Co.*, (1925) 267 U.S. 233, 239. "Vagueness" has been defined as whether in certain respects "men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Const. Co.* (1926) 269 U.S. 385, 391. California courts have also adopted this definition of vagueness. *See McNurty* v. *State Board of Medical Examiners* (1960) 180 Cal.App.2d 760, 766.

The essence of the void for vagueness doctrine is to prevent an individual from sustaining harsh penalties by providing very clear guidelines thereby providing adequate and fair notice, as to what conduct is specifically proscribed. *Grayned* v. *City of Rockford* (1972) 408 U.S.

102, 109. *See The Void-For-Vagueness Doctrine in the Supreme Court* (1960) 109 Univ.Pa.L.Rev. Where a defendant can prove that he could not reasonably have understood that his contemplated conduct was prohibited, he may successfully assert unconstitutional statutory vagueness. *United States* v. *National Dairy Products Corp.* (1963) 372 U.S. 29, 32-33.

Petitioners contend that California Government Code section 1090, which embodies California's fundamental conflict of interest legislation, is unconstitutionally vague on its face. Section 1090 provides:

> Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.
>
> As used in this article, "district" means any agency of the State formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

The words "financially interested" are impermissibly vague because they do not specifically provide *to what extent* such interest is prohibited. What is deemed a "direct" interest has posed no problems. The law is clear that where the public official was also the contracting party, or a partner or substantial shareholder of the contracting entity, such offending contracts were void.

Similarly, what conduct is permitted in spite of section 1090 is easily discernible. Government Code section 1091 carefully delineates all permissible relationships which an official may share with the contracting party without

running afoul of section 1090, by deeming such interests as validly "remote." Another exception to section 1090 is found in section 1091.1, whereby an official shall be permitted to subdivide land he owns or in which he has an interest provided that he gives full disclosure to the pertinent official body and abstains from voting on such related matters. Thus, it appears that the official may potentially benefit from such subdivision as long as he adheres to the disclosure and abstention requirements. Finally section 1091.5 carves further exceptions to liability under section 1090.

The problem with section 1090 is what "indirect" interests are expressly prohibited. The statutes are ambiguous, the case law equally so, offering little guidance to officials who must know what indirect interests are not so safely remote as to be outside the scope of section 1090. Officials cannot receive fair and clear warning of such proscribed conduct which is violative of due process concerns of the Fourteenth Amendment of the U.S. Constitution. To the extent that section 1090 sets a potential trap for even the wary official who may act in good faith, honestly, fairly and openly, section 1090 must fail for vagueness. It has failed to protect officials from arbitrary and discriminatory governmental action.

Therefore, petitioners respectfully request that this Supreme Court grant certiorari to review California's conflict of interest laws.

II. CALIFORNIA GOVERNMENT CODE SECTION 1090 AS APPLIED IN THE CONTEXT OF THESE FACTS IS UNCONSTITUTIONALLY VAGUE AND THE $500,000 FORFEITURE PUNISHMENT IS FORBIDDEN

Assuming arguendo that California Code Section 1090 is not impermissively vague on its face, petitioners con-

tend that the statute, as applied to the facts in petitioners' case, was enforced in an arbitrary and discriminatory manner. The California Supreme Court (Court) affirmed the trial court judgment that petitioners CALL had violated section 1090. The prohibited "interest" was found in a series of events which began in November of 1973 when Interstate General Corporation (IGC—developer) offered to give to the City of Albany (city) a choice of two park sites in exchange for obtaining use and building permits to erect 2,500 apartment units on its property.

One park proposal relating to four acres of "Creekside Park" is *not* related to any land owned by petitioners. The alternative proposal by the developer could have resulted in the purchase of petitioners' land. It was an offer by the developer to expend $600,000 of its *own funds*, with total discretion in the developer, to purchase some hilltop land to which it would add a couple acres of its land. The entire parcel would then be conveyed to the city for use as a park.

Fearing a possible violation of section 1090, petitioner, who has a sixth grade education, sought the advice of the city attorney from the onset. The city attorney opined that petitioner would not violate section 1090 by the possible acquisition of his land by the developer. However to be absolutely circumspect, the attorney advised petitioner to make a full public disclosure of his land holdings on top of the designated hill and to abstain from discussing or voting on any measure which might affect his property interest. Petitioner carefully complied.

The city council selected the $600,000 plan on November 13, 1973 without petitioner's vote, thus a contract was formed. In June of 1974, the developer through its agent contracted with petitioners to buy their land in

performance of its agreement with the city, but subject to the city's completion of performing its contract to issue the building permit. Having completed the purchase of sufficient hilltop lots, the developer, now owner of those acreage, deeded to the city its hilltop property in performance of its contract. The developer was granted the coveted building permit.

The Court concluded that petitioner had violated section 1090 without truly determining whether or not it was direct or indirect. (38 Cal.3d ____, 214 C.R. at 146). It based its conclusion on the finding that "purchase of the CALLS' parcel was clearly part of a previous arrangement" (*Id.* at C.R. 145) and that "CALL sold property to the city, using IGC as a conduit." (*Id.* at C.R. 146)

There is absolutely *no* evidence to support this finding that a "previous arrangement" had existed between the developer and petitioners. The trail court made no such finding. In fact, no prior relationship, understanding, or agreement of any kind existed between those two parties. It was not until the developer made an offer to purchase petitioners' land in performance of its city contract that a relationship was finally established. This point was respectfully raised in a petition for rehearing to the Court. Respondent's reply papers were silent on this point.

This grievous error by the Court was the basis of its subsequent holding that petitioner had "sold" his property to the city vis-a-vis the developer as a conduit. Once again the record is devoid of any evidence even suggesting that the developer was an agent for petitioner. The Court also ruled that the developer was *not* an agent or trustee of the city. The only logical explanation of how the developer could have become the alleged conduit of peti-

tioner is if we were to assume that this entire series of transactions was originally conceived and initiated by the petitioner who somehow contrived to "sell" his land to the city through a complex transaction. But the record is clear of any inference of wrongdoing by petitioner.

Although the Court labelled petitioner as the "seller" of this land to the city, the decision repeatedly refers to the contract as between the developer and the city, and to IGC's purchase . . . from the CALLS . . .", all the while denying that the developer was an agent or trustee for the city. If petitioner truly was a "seller" then it necessarily follows that the city must have been a buyer. Yet the $600,000 never belonged to the city. The developer used *its* private funds to purchase targeted property. The developer had *full discretion* in choosing the realty to purchase and the amount it wished to expend for it. The $600,000 figure was determined solely by the developer who quite possibly viewed it as a $400,000 savings since it had theorized that it would have to expend nearly one million dollars to acquire hilltop lots to prevent any competing development. Acquisition of petitioners' land was not necessarily essential in fulfilling its contractual obligations. In fact, failure to obtain petitioner's land would not have been fatal if it had been able to acquire other adjacent land from a third landowner.

Given these facts, and given no evidence whatsoever of any previous "arrangement" between the developer and petitioner, the Court erred in concluding that petitioner had sold his land to the city in violation of section 1090. This decision is in direct contravention to the rules established in *Escondido Lumber* v. *Baldwin* (1906) 2 Cal. App. 606, 608, and in *City of Oakland* v. *California Const. Co.* (1940) 15 Cal.2d 573, 577 that an official may not be held culpable under section 1090 if the conflict arose *after* the

award of the contract, and no express or implied agreement existed between the official and the contracting entity.

The facts indicated that at the time of the agreement in which the city accepted developer's $600,000 plan, petitioner's interest was clearly not direct, nor could it be said that it was impermissibly indirect. Petitioner had a future, potential interest in the contract. It was never certain that petitioner's land would necessarily be involved, as other lands owned by others could have fulfilled the developer's goals. But even if petitioners' land were considered by the developer, it was never certain whether or not any offers would have been acceptable or whether a sale could have been consumated. Under these facts, it cannot be said with such finality as did the Court that ". . . the prospect that performance would involve acquisition of the CALLS' and conveyance of that land to the city was contemplated by all parties." (214 Cal.3d at C.R. 1)

Petitioners contend that relying on *Escondido, supra,* they participated in the spring and summer of 1974 *only* in the performance of an already existing contract between the developer and the city. Petitioner further contends that such participation in the performance of a contract, absent a prior arrangement, has never previously been considered as a prohibited interest in California, nor in decisions reported in many other states. *See People* v. *Deysher* (1934) 2 Cal.2d 141. *See also, Kaufman, California Conflict of Interest Laws* (1963) 36 So.Cal.L.Rev. 186, 197-98.

By adhering to the fiction that some kind of prior arrangement must have existed between petitioner and the developer the Court imposed a cruel forfeiture upon

petitioner. Moreover, the Court failed to permit petitioner leave to amend his complaint to include an equitable estopel defense. Perhaps in recognition of the unjust and nightmarish result, the Court apologetically admitted on two separate occasions:

> the resulting forfeiture seems harsh under the facts of this case. CALL was found not to have committed fraud, actual or constructive, or to have conspired to violate section 1090. Indeed, he did seek and obtain advice from the city attorney on certain occasions, and he did follow the specific advice he received. No evidence in the record supports an inference that CALL actually initiated the entire transaction. 214 C.R. at 147;

and again at page 149:

> . . . the forfeiture in this case is undeniably harsh in light of the absence of fraud and CALL's partial reliance upon advice given by the city attorney.

After a lengthy discussion about less punitive and more just remedies which could have been made applicable to petitioner, the Court fell back on the public policy argument that only a painful result will effectively frighten officials from committing violations of conflict of interest laws. Petitioners had become sacrificial lambs.

The irony, the great injustice here is that Petitioner, with only a sixth grade education, who had worked so hard over the years to acquire some realty as well as attain a public position, was aware that the transaction being contemplated by the developer could have invoked the prohibitions in section 1090. Hence, he very carefully sought the advice of the city attorney, a presumed expert on such conflict of interest mattters, and meticulously followed his counsel. How was petitioner to have known that he could not have safely relied on the city attorney's

advice? And that such purportedly erroneous advice was not remediable due to immunity afforded municipalities and government attorneys, pursuant to California Government Code sections 822.2 and 815 respectively? How was he to have known that he should have retained private counsel who *may* have recommended that he simply await possible eminent domain proceedings by the city? And how could he, a councilman of modest means in a rather small blue-collar town in California, have afforded all this private legal advice? Finally, how could he have foreseen that the courts would misconstrue the events, perhaps even find facts where none existed, to find him guilty of violating the law, despite his earnest and reasonable efforts to do everything "right" under these circumstances?

Harsh results have followed from the Court's failure to treat indirect interests differently from direct interests. *See Conflict of Interest In Public Contracts* (1956) 44 C.L.R. 355, 367. Further evidence of the ambiguity of the proscribed "indirect" interest is found in an opinion by the California Attorney General which advises that it is *not* a conflict of interest for a county supervisor, who is also a real estate broker, to represent a buyer or seller in a real estate transaction which is *contingent* upon county approval such as the issuance of building or use permits. 64 Ops.Atty.Gen. 796 (1981). The facts in the instant case are somewhat analogous, but instead of petitioner being a broker to the developer, he was a potential seller. In both instances, the transactions were contingent upon the contracting party's obtaining a permit through the municipality. However, the profit earned by the broker/official as fees from that sales transaction was not held illegal, yet the profit earned by the official resulting from the contract for sale between the developer and the official was deemed illegal, with the imposition of harsh penalties.

This grave inconsistency in what kinds of profits are deemed acceptable highlights petitioners' contention that the state of law regarding what is actually prohibited "indirect" interest is at best ambiguous. This ambiguity has entrapped petitioner subjecting him to unduly harsh penalties. Because the penalty is so severe, petitioner contends that the absence of any scienter requirement violates the due process clause of the Fourteenth Amendment of the Federal Constitution. *See, The Void-For-Vagueness Doctrine In The Supreme Court* (1960) 109 Univ.Pa.L.Rev. 67, 87. *See also Village of Hoffman Estates* v. *Flipside Hoffman Estates, Inc.* (1982) 455 U.S. 489. The determination of whether a statute will survive a vagueness attack should include a careful look at the penalties which may be imposed. *Wilson* v. *Chancellor* (1976) 418 F.Supp. 1358, 1365.

Petitioner contends that the California Court's decision is repugnant to due process concerns and that California's vague conflict of interest statutes cannot pass constitutional muster.

The importance of this erroneous decision cannot be overlooked; it has far-reaching consequences in this state. Thus petitioners respectfully request that this Supreme Court grant certiorari to review the California decision in this matter.

III. THE CALIFORNIA SUPREME COURT'S DECISION IN THIS CASE CASTS A CHILLING EFFECT ON ALL PUBLIC INTERESTS AND ASSETS WITHIN THE COMMUNITY THEY SERVE.

It is well established that conflict of interest legislation involves two competing public policies: the need to attract competent individuals to public positions weighted against the need to deter conflicts of interests. The Cal-

ifornia Supreme Court's decision in this case has set a dangerous precedent for the thousands of public officials in this state; the result of this case is not confined to petitioners alone.

The California decision as it stands will have a most chilling effect on all public officials in California who own property of any kind, who have pecuniary interests of any kind. With the growing ambiguity of the law governing conflict of interest, officials increasingly risk the possibility of disgrace, criminal penalties, even possible bankruptcy should they choose to rely on their own municipality's legal advisor, whose advice may later be found in error.

California courts have long recognized the two-step transaction fact situations whereby an official may be involved in the performance of a contract if no conflict exists at the time of the initial contract between the municipality and the contracting party. Such transactions have long been upheld so long as no prior arrangement or relationship can be established. *Escondido Lumber* v. *Baldwin, supra,* ruling to this effect, has never been overruled.

Other jursidictions faced with similar kinds of fact situations have reached a similar result. So long as there existed no interest in the contract at the time of its making, the courts have uniformly held that no violations had occurred. *See O'Neill* v. *Town of Auburn* (Supreme Court of Washington, 1913) 135 P.1000; *Ex Parte Howell* (Idaho, 1915) 150 P.19; *People* v. *Southern Surety Co.* (Michigan, 1917) 165 N.W. 769; *Commonwealth* v. *Withers* (1936) 266 Ky 29; *Kerr* v. *State* (Indiana, 1917) 116 N.E. 590.

The California Supreme Court's abrupt departure from this line of reasoning with its interjection of new and

frightening rules may now allow a seemingly innocent and violation-free set of facts to be twisted into being deemed illegal conduct resulting in tremendous penalties. This decision will create a nightmarish dilemma for officials who own significant property and interests in their community.

The Court's decision left alone will have the nefarious effect of encouraging public officials to seek private legal counsel at each step of any significant government function which may remotely affect the official. The very wealthy would not be too terribly inconvenienced as they could well afford such additional counsel. The very poor would be judgment proof. However the majority of officials who are undoubtedly in similar positions to petitioners may be crippled with a nagging fear that they may somehow be caught in a web of illegality. They may be discouraged from taking certain actions which may be quite permissible for fear that their actions may be misconstrued by a hostile taxpayer. They will no longer have the freedom to steer between lawful and unlawful conduct.

It is paramount that California's officials be not left with such tremendous uncertainty as to what interests are prohibited under the vaguely enacted section 1090. The decision below, left undisturbed, would greatly discourage many competent, well-intentioned individuals from serving in an official capacity. This California cannot afford. It is for these reasons that petitioners strongly urge this Court to exercise its supervisory powers and grant certiorari.

IV. THE CALIFORNIA SUPREME COURT'S DECISION IN THIS CASE PERMITS A CIVIC PARK TO BE BURDENED WITH A CHRISTIAN CROSS, IN VIOLATION OF THE ESTABLISHMENT CLAUSES OF THE U.S. CONSTITUTION AND THE CALIFORNIA CONSTITUTION.

During the October 1984 term of the United States Supreme Court, the Establishment Clause was the subject of three cases. Clear support for separation of church and state was strongly proclaimed.

In *Wallace* v. *Jaffree* (1985) 44 CCH S.Ct. Bull.pB3251, et seq., United States Supreme Court Justice O'Connor quoted from *Lemon* v. *Kurtzman* (1971) 403 U.S. 602 to outlaw the school prayer statute. Her discussion at B3284 and 3285 highlights concern that this single purpose park in which the inescapable central feature is the Lions Club's monumental cross:

> sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. (quoting *Lemon.*)

Justice O'Connor's opinion in *Wallace* expresses a duty upon the judiciary to "examine whether government's purpose is to endorse religion and whether the [acceptance of the mini-park dedicated to this cross] actually conveys a message of endorsement." (B3285)

Before the end of June, the United States Supreme Court decided *Estate of Thornton* v. *Caldor, Inc.* (1985) ___ U.S. ___, in which it invalidated legislation which allowed a Sabbath holiday from work. At the close of the term on July 1, 1985, *Aguilar* v. *Fenton* and *School District of Grand Rapids* v. *Ball* (1985) ___ U.S. ___ invalidated federal legislation to finance education for under-

privileged parochial school children to the extent that federal funds are used to pay public school teachers to teach classes held in the parochial schools. It must be noted that although the Reagan administration has adopted a position in support of the school aid and school prayer cases, and has promoted other church/state establishment conflicts, the United States Supreme Court has been steadfast in its refusal to support establishment. Justice O'Connor continued at B3285:

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for '[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.' *Engle* v. *Vitale*, 370 U.S., at 431.

The California Supreme Court addressed the issue of the Establishment Clause in *Fox* v. *City of Los Angeles* (1978) 22 Cal.3d 792. The court forbade the expenditure of a few pennies a day to light up the Los Angeles City Hall tower with single and double bar crosses to celebrate Christmas and Easter according to the conflicting calendars of various Christian sects. In interpreting Section 5 of Article XIV of the California Constitution, the Court stated:

> This section has been said to constitute 'the definitive statement of the principle of government impartiality in the field of religion.' (37 Ops.Cal.Atty.Gen. 105, 107 (1961)) An examination of the debates of the constitutional convention which drafted the Con-

> stition of 1879 indicates that the provision was intended to insure the separation of church and state and to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes. (*Gordon* v. *Board of Education* (1947) *supra*, 78 Cal.App.2d 464, 472-473, 178 P.2d 448.) Under this section, the fact that a statute has some identifiable secular objective will not immunize it from further analysis to ascertain whether it also has the direct, immediate, and substantial effect of advancing religion. Thus in *Frohliger* v. *Richardson* (1923) 63 Cal.App. 209, 217, 218 P. 497, the court struck down a statute appropriating money for the restoration of the San Diego Mission although it conceded that secular, i.e., historical and cultural—as well as religious ends were served by the enactment. (See also *County of Los Angeles* v. *Hollinger* (1963) 221 Cal.App.2d 154, 34 Cal.Rptr. 387 (religious Christmas parade); 37 Ops.Cal.Attn.Gen. 105 (1961) (religious public play); *Calif. Educational Facilities Authority* v. *Priest* (1974) 123 C.3d 593, 605, 116 Cal.Rptr. 361, 368.

That opinion continues at page 605 to state that establishment clause "bans any official involvement, whatever its form, which has the direct, immediate and substantial effect of promoting religious purposes."

In this present case, the California Supreme Court has clearly permitted a religious park to be created by the transfer to a governmental entity of a Christian shrine protected by an easement to a service club. A graphic description of the cross is found in the Court's opinion:

> This large monumental cross—a steel structure 15 to 20 feet high and firmly anchored in a permanent base—had been erected by the Lions Club in 1971 with the CALLS' permission. Visible from all areas

> of the city, it was (and still is) illuminated at night during the Christmas and Easter seasons. (Opinion, pages 10 and 11, correction added.)

The trial court concluded at C.T. 116-117 (in the total absence of testimony or other evidence) that:

> 13. The primary effect of the acceptance of the CALL parcel by he City—the addition of 1.1 acres of land to the City's park system—neither advanced nor inhibited religion; rather, the primary effect was to provide additional park land to the City and had negligible, if any, effect on any religious freedom.
>
> 14. The acceptance of the CALL Parcel by the City did not constitute excessive governmental entanglement with religion.
>
> 15. The acceptance by the City of real property encumbered by an easement for ingress and egress for the maintenance of a cross did not constitute action in violation of the First Amendment to the United States Constitution or by law, statutory or decisional.

The Court did not require rescission or declare that the transaction was void for violation of the California Constitution. This little constitutional infirmity was considered excusable with a money damages "indulgence" suggested by the diminished quality of the developer's performance. The Court evidently was not aware that religious services *continue* to the present, and the old mission analogy evidently was applied. While it is true that the cross has been displayed on Albany Hill for much of this century, its historic implication is not supported by the civilizing activities advanced through the California missions at the beginning of this state's colonial history. The opinion does not explain the justification for perpetuating this shrine, and its only discussion of the cross and the easement concerns the reduction of value of the park in money

terms. *The opinion totally omits consideration of the impact of the developer's breach of contract in constitutional terms and vis-a-vis the harsh remedy imposed on Mr. CALL.*

The Albany Hill cross dominates "overlook park" and cannot be ignored by those who use the 7½ acre area.

Fox goes to the heart of "establishment" at page 797:

> The California Constitution also guarantees that religion shall be freely exercised and enjoyed 'without discrimination or preference.' Preference is forbidden even when there is no discrimination.

In the instant case, the California Court ruled that the city could acquire an operating religious park "maintained" by a local service club, but that the constitutional problems presented by the cross and the easement may safely be left to a later damage suit for poor performance by IGC (dissent page 3). The establishment constitutional problems constitute the very factors rendering the park "unsuitable" for use as a public park, in absolute derogation of the contract between IGC and the City. Such failure of performance of the IGC-City contract is the very basis of the instant action by petitioners, for instead of a park suitable for all members of the public without regard to religion, the City of Albany has gotten land burdened with a cross.

A later damage suit, suggested by the Court based on the same absence of performance by IGC, is, in essence, tantamount to a splitting of actions and invites waste of judicial resources. Full relief, including rescission of the IGC-City contract, should have been granted for the same underlying failure of performance.

Petitioners contend that the initial attempt to convey their land to the city was *void* because the "Establish-

ment" clauses of both the federal and California Constitutions prohibit receipt by a public entity of land which had been made into a Christian shrine by the erection of a 21 foot illuminated cross. Because the California Supreme Court, by its decision has effectively permitted this violation to continue, petitioners respectfully request this Supreme Court to grant certiorari and review this important matter.

CONCLUSION

For all of the reasons stated above, petitioners HUBERT and RUTH CALL respectfully request this Court to grant their petition for certiorari to the California Supreme Court.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

S.F. 24693
Super. Ct. 448248-8

BRUCE THOMSON *et al.*,
Plaintiffs and Appellants,

v.

HUBERT CALL *et al.*,
Defendants and Appellants;

CITY OF ALBANY *et al.*,
Defendants and Respondents.

FILED IN THE COURT
May 23 1985
Laurence P. Gill, Clerk

(SEE CONCURRING AND DISSENTING OPINION)

The truism that a person cannot serve two masters simultaneously finds expression in California's statutory doctrine that no public official shall be financially interested in any contract made by that person or by any body or board of which he or she is a member.[1] Plaintiffs in this taxpayers' suit challenge the validity of a transaction in which defendant Cebert Properties, Inc., purchased a parcel of land from defendants Hubert F. Call (Call) and Ruth L. Call, his wife, for $258,000

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[1] Of greatest statewide application are Government Code sections 1090, 1091, 1092, and 1097, and Education Code sections 35233, 35240, and 72539. Other provisions designed to meet particular conflict-of-interest problems are scattered throughout the other codes. (See, e.g., Health & Saf. Code, §§ 50904, 50905; Pen. Code, §§ 99, 100; Pub. Util. Code, §§ 12722, 12392; Bus. & Prof. Code, § 19423.)

and then conveyed the parcel to the City of Albany (city)—while Call was a member of the Albany City Council.

The defendants named in the complaint included the city, the Calls, various council members who served with Call, Cebert Properties, Inc., and three other corporations. After a nonjury trial, the court found (1) Call's financial interest in the transaction violated Government Code section 1090;[2] (2) the Calls were liable to the city for the $258,000 they received from the sale, plus interest; (3) the city was nevertheless to retain title to the land; and (4) relief was to be denied as to the other defendants. Judgment was entered accordingly.

The Calls appeal from the judgment insofar as it holds them liable to the city for the $258,000 plus interest. Plaintiffs appeal from it insofar as it denies relief as to the corporate defendants.[3] These appeals present the question of what remedies are available once a section 1090 violation is found and the fully performed underlying contract is adjudged void.

Facts

The summit of Albany Hill commands a panoramic view of Albany and San Francisco Bay. In and before 1972, IGC owned 36 acres of land at the westerly base and on the adjacent slope

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[2] In pertinent part, section 1090 states that "[C]ity officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." Unless otherwise noted, all section references are to the Government Code.

[3] The named defendants were Interstate General Corporation (IGC); Interstate General Development, Inc. (IGD); Interstate Albany Corp. (IAC); and Cebert Properties, Inc. (Cebert). At all times relevant to the challenged transaction, IAC was a subsidiary of IGD, IGD was a subsidiary of IGC, the stock of Cebert was owned by James J. Wilson, and James J. Wilson was both the president of IGC, IGD, and IAC and a director of all four corporations. For purposes of this litigation, the four corporations are essentially interchangeable.

of the hill. That slope and the summit were undeveloped in 1972. The land at the summit consisted of four contiguous parcels: a 1.1-acre parcel owned by the Calls; a 2-acre parcel which was the uppermost part of the 36 acres owned by IGC; a 2.2-acre parcel owned by a partnership (Albany Hill Associates); and a 2-acre parcel owned by Golden Gate Hill Development Co.

In 1972, all of these lands were within a hill control (HC) district estabilshed by the city's zoning ordinance. IGC's 36 acres were zoned R1HC (for single family dwellings) and the Calls' parcel was zoned R3HC (for high-rise, high-density residential units). Under a city ordinance, no building permit for the erection of any structure on HC district land could be issued unless a use permit had first been obtained from the city council.

Planning to construct a 2,500-unit high-rise residential complex on its 36-acre parcel, IGC applied to the city council for a use permit in July 1972. This application included a request that the parcel be rezoned from R1HC to R3HC. IGC's project proposal met with general approval at subsequent public meetings. Members of the council repeatedly stated that any pending use permit should be subject to a condition requiring IGC to dedicate land on Albany Hill for use as parks and permanent open space.

In August 1972, the city council considered a parks and recreation commission proposal that a site for a municipal park be acquired at the summit of Albany Hill.[4] The council voted to "go on record as generally concurring" with the park proposal. Councilman Call, though present at the meeting, did not participate in the discussion of the proposal and he abstained from the vote.

A series of offers, counteroffers, and negotiations between IGC and the city began in October 1972, when the city attorney

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[4] This site later became known as Overlook Park.

and the city's administrative officer proposed certain conditions to be included in the use permit. These included a requirement that IGC dedicate its two-acre summit parcel and a creekside parcel at the base of the hill to the city.

IGC rejected this condition on November 3, 1972, and proposed its so-called "$600,000 plan." This plan required IGC to "allocate" $600,000 of its own money for the acquisition of land for Overlook Park; to spend that sum, or less, for the acquisition of such land by IGC through "private negotiation"; to convey any land so acquired to the city, for use as part of the park; and to pay to the city any unexpended balance of the $600,000 for use in "condemning by eminent domain" any land required for the park but not acquired from IGC pursuant to the $600,000 plan.[5]

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[5] Referring to "our application to develop our property in Albany," IGC's letter of November 3 continued: "Should our application be granted, we agree to allocate $600,000 to acquire such of the real property as may be available, first by private negotiation at what we, in our judgment, regard to be reasonable prices, at the hilltop area of Albany Hill, within the boundary line designated by the City . . . [as] . . . Overlook Park. [¶] While this property is not subject to any public use by the City and has not been heretofore the subject of any litigation in eminent domain for acquisition by the City, the developer is agreeable to providing the City, not as a consideration or a condition of the zoning application, but in the general overall public interest, with no countervailing advantage to the developer, concurrent with the issuance of the first construction permit, by deed to the City, as a gift, such of the real property as it has been able to acquire for the $600,000 that the City is agreeable to using as a gift for the sole purpose of being a permanent park and open space for the City. . . . [¶] The land, together with the acreage that we will be dedicating . . . will provide the City . . . with a unique, superb and useful view park for the public enjoyment and open space. If, in our negotiations, we are unsuccessful in concluding purchase arrangements with the private landowners who own real property within the area of the proposed park, we reserve the right to pay over to the City . . . all unexpended funds, as a gift and not as a consideration of any

On November 10, 1972, the city offered an alternative proposal, at the same time asking IGC to "reiterate" the $600,000 plan outlined in its letter of November 3. In a letter dated November 12, 1972, IGC reiterated the $600,000 plan, offering to expend the $600,000 in acquiring additional property for the proposed Overlook Park, all at or above the 200-foot contour of the hill, and to donate its own 2-acre parcel at the summit. The only land at or above the 200-foot contour not already owned by IGC consisted of the contiguous parcels owned by the Calls, Albany Hill Associates, and Golden Gate Hill Development Co.

The city council acted on IGC's application at a meeting on November 13, 1972. In the first of three successive votes, the council amended Albany's zoning ordinance to rezone IGC's thirty-six acres from R1HC to R3HC. Next, it voted to grant the use permit to IGC on specified conditions which included conveyance of IGC's two-acre parcel to the city "for the sole purpose of being a permanent park and open space for the City."[6] The $600,000 plan—not listed as a condition of the use permit—was reached in the council's third action, when a majority voted to accept IGC's "offer" to allocate $600,000 "for the purpose of purchase of additional private property to encompass the proposed Overlook Park. . . ." Call was present at this meeting. He voted to rezone IGC's property and to grant the use permit. He abstained from the vote that the city "accept the offer" of IGC relative to the $600,000 plan.

It should be noted that on several occasions Call asked the city attorney whether or not the could speak on certain issues

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zoning application, from the $600,000 so that the City may use these funds solely for condemning by eminent domain all of the lands that the City requires [for Overlook Park]."

[6] Whether conveyance of the two-acre parcel was part of IGC's original offer is unclear. IGC's letter of November 3 referred to "the acreage that we will be dedicating" which—presumably—included the two-acre parcel at the summit. However, the two-acre summit parcel was not specifically designated until IGC "reiterated" its original offer.

or vote on certain issues pending before the council, and on such occasions he was advised not to speak or vote if real property in which he had a financial interest was involved in the pending issues. Call generally followed such advice when it was sought and given. In this instance, he was told by the city attorney that he could discuss and vote on IGC's applications for rezoning and for the use permit.

Shortly thereafter, the city's administrative officer made it clear to IGC that the first building permit would not be issued until land had been acquired under the $600,000 plan. IGC then obtained appraisals of the three summit parcels owned by the Calls, Albany Hill Associates, and Golden Gate Hill Development Co. Using the results of these appraisals, it extended offers to the respective owners. None was accepted.

IGC's appraiser appraised the Calls' 1.1-acre parcel at $63,800. Responding to the $63,800 offer for his property, Call wrote to IGC, describing recent sales of "comparable zoned properties" in Albany. He stated: "While we have no interest in selling at this time, we would be agreeable to having the property go into a park for the City of Albany. From the comparables listed above, our property is clearly worth $360,000. . . . In view of the above mentioned, your offer is unacceptable. I would be willing to meet and negotiate."

IGC then authorized real estate broker Jack Krystal to negotiate with the property owners to arrange purchases in satisfaction of the $600,000 plan. Krystal's commissions were to be paid by the sellers.

After rejecting Krystal's first offer of $180,000, Call agreed to sell to IGC for $258,000.[7] At all times during the negotiations with Krystal, Call knew that IGC was acquiring the parcel for conveyance to the city pursuant to the $600,000 plan.

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[7] Krystal also obtained Albany Hill Associates' summit parcel at a price considerably higher than the original offer. Together, the two purchases exhausted all but $2,000 of the $600,000.

In June 1973, Krystal presented a written contract to the Calls, wherein IGC offered to buy their 1.1-acre parcel for $258,000. The offer was for title to the parcel "free of liens, encumbrances, easements . . . and conditions of record . . . other than exceptions of record" shown in an attached preliminary title report. IGC expressly conditioned the contract upon its "being issued all necessary permits to a project located adjacent to this property.[8]

The written escrow instructions provide a clear overview of the transactions. IAC delivered buyer's instructions with which it deposited in escrow an application for the first-phase building permit; the sum of $600,000; and an additional $68,000 to cover fees and charges payable to the city upon issuance of the building permit. IAC instructed the escrow holder to pay "any remaining balance" of the $600,000 to the city, and to pay the $68,000 to the city, upon receipt in escrow of a building permit issued by the city.

The city's escrow instructions directed the escrow holder to transmit the buidling permit to IAC when the holder was able to transmit to the city the required fees ($68,000), the unexpended balance of the $600,000 plan ($2,000), and the grant deeds for the summit parcels.

The Calls deposited two grant deeds with instructions to deliver both deeds when the escrow holder held for their account the $258,000, minus certain itemized deductions. One of the deeds was a grant deed which conveyed the 1.1-acre parcel to Cebert, the entity IGC had designated as the actual buyer of the two parcels from the Calls and Albany Hill Associates. The other was a grant deed conveying to the Albany Lions Club "an easement" on the parcel "for ingress and egress to maintain the existing cross standing" on the parcel. This large monumental cross—a steel structure 15 to 20 feet high and

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[8] This condition was also included in the contract between IGC and Albany Hill Associates, the partnership whose 2.2-acre parcel IGC acquired in partial satisfaction of the $600,000 plan.

firmly anchored in a permanent base—had been erected by the Lions Club in 1971 with the Calls' permission. Visible from all areas of the city, it was illuminated at night during the Christmas and Easter seasons.

Shortly before the close of escrow, Call had insisted upon burdening the parcel with the easement,[9] and although it was not an "exception of record" to its title, IGC offered no objection. The president of IGC testified that although he would not have been willing to pay as much for the Calls' parcel with the easement on it (because of the obvious diminution in the parcel's value), he was fairly indifferent to the creation of the easement on what was to be a public park. Without objection, therefore, the parcel was burdened with the easement before it was conveyed to Cebert (and by Cebert to the city).[10]

At a meeting conducted on August 21, 1973, the city council adopted a resolution by which it approved a tentative map of IGC's project. Call voted for this resolution. The council also adopted a resolution accepting the grant deed from Cebert, as well as a "ratifying" resolution in which it stated that it did "approve and ratify the purchases of the certain real properties . . . described in that Grant Deed [refered to in the previous resolution]." Acting on the advice of the city attorney, Call abstained from voting on these two resolutions. There is no evidence that the members of the council, other than Call, knew that the Calls' 1.1-acre parcel was being accepted by the city subject to the easement for maintenance of the cross.

When escrow closed on August 24, 1973, the Lions Club had the cross and its easement for the maintenance of the cross.

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[9] Call testified that he told Krystal he would sign the sales contract "on one condition . . . that the cross will remain there permanently and an easement over the property to the cross is granted."

[10] Cebert deposited into escrow a grant deed conveying title to both parcels to the city. The deed did not show that title to the Calls' parcel was to be conveyed subject to an easement held in connection with the cross.

IGC had its building permit and began large-scale construction of its project shortly thereafter. The city had acquired land for Overlook Park, including the Calls' parcel, subject to the easement held by the Lions Club. And, of course, the Calls had their $258,000, less certain itemized deductions such as the broker's commission.

Evidence received as to the fair market value of the Calls' 1.1-acre parcel in 1973 was detailed and conflicting. IGC's appraiser fixed it at $63,800 as of February 18, 1973. Plaintiffs' appraiser testified that the value of the parcel was $100,000 in March of 1973. By contrast, an appraiser who testified for the Calls' fixed its value in August 1973 at $450,000. All three appraisals are premised upon the assumption that the highest and best use of the 1.1-acre parcel was for the high-density residential construction which its R3HC zoning permitted. The $63,800 figure was based upon the estimate that the parcel would accommodate 22 units evaluated at $2,900 per unit for appraisal purposes.[11] Plaintiffs' figure of $100,000 was based on an estimate of 35 units evaluated at approximately $3,000 per unit. The Calls' figure was based on 90 units at $5,000 per unit.

Although the Calls had acquired the parcel in 1970 at a price much lower than any of the appraisers' figures, there was evidence that the pendency and size of IGC's project had substantially increased the market value of the parcel and nearby proerty in 1972 and 1973. On the other hand, testimony by several witnesses supported an inference that the value of the parcel had been severely diminished by the location of the cross and by the easement granted to the Lions Club. Obviously, the cross and easement would prevent or limit construction of the high-density residential units allowed by the parcel's zoning and presupposed by the appraisers' "highest and best use" calculations.

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[11] The president of IGC disagreed with his appraiser's assumption that only 22 units could be constructed on the parcel; he estimated that it would accommodate 90 units at $3,000 per unit.

DECISION OF THE TRIAL COURT

The trial court filed a memorandum of decision reviewing the evidence in detail and stating the following conclusions: the complex transaction had produced a "single contract" in which Call had a financial interest in violation of section 1090; the appropriate remedy consists of retention by the city of the parcel of land sold by the Calls and a "forfeiture" of the $258,000 (plus interest) by the Calls to the city; the other defendants are not liable to the city in any respect.[12] With regard to IGC, the court found that IGC had not made itself a trustee or agent in agreeing to devote $600,000 to acquisition of property to be deeded to the city and that even if it had become a "trustee," it faithfully fulfilled the "specific directives in the trust agreement."

Following its memorandum of decision, the trial court signed and filed elaborate findings of fact and conclusions of law and entered a judgment ordering that plaintiffs "take nothing by their complaint" from the corporate defendants and that they recover the $258,000 with interest from the Calls. The court found that no defendant had perpetrated a fraud, actual or constructive, on the city and that no defendant had conspired to defraud the city or to violate section 1090. Addressing the potential establishment clause problem raised by the city's acquisition of property burdened with a cross, the court found that the acquisition had a secular purpose and effect (use by the public as a park), that acceptance of the land neither advanced

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[12] During the trial, plaintiffs had dismissed the action with prejudice as to defendant Jack Krystal. At the close of plaintiff's case, Call's fellow councilmen moved for judgment under Code of Civil Procedure secion 631.8. That motion was granted.

Although the court found that IGC was not liable to the city, it did note that IGC had apparently breached its agreement by conveying the Calls' parcel encumbered with the easement in favor of the Lions Club. However, it did not render judgment against IGC, observing that there was "no cause of action in Plaintiffs' complaint embracing such a breach."

nor inhibited religion, and that it did not constitute excessive governmental entanglement with religion or violation of the First Amendment.

DISCUSSION

I

However complex the transaction, IGC's purchase of property from the Calls and Albany Hill Associates, and its conveyance of that property to the city, were in performance of a single multi-party agreement. The scope of this agreement and the interdependency of the many subordinate transactions are best revealed in the escrow instructions themselves.[13] IGC's letters proposing the $600,000 plan, the relevant resolutions adopted by the city council, the acceptance of the deeds and ratification of the purchases made by IGC, the use and building permits, and the real estate purchase contracts concerning the Call parcel and the Albany Hill Associates parcel further reflect the terms and conditions of the agreement.

The Calls contend that the purchase of their parcel was not a term or condition of the contract between IGC and the city, but was, rather, later negotiated in the performance of the contract by IGC. However, the prospect that performance of the contract would involve acquisition of the Calls' land and conveyance of that land to the city was contemplated by all parties. The land was one of only three parcels at the summit of Albany Hill which were expressly targeted in the contract for acquisition by IGC and conveyance to the city. Purchase of the Calls' parcel was clearly part of a previous arrangement; the fact that the real estate purchase contract between the Calls and IGC was entered into after the city's acceptance of the $600,000 plan in no way alters the fact that the transactions between the Calls, IGC, and the city were part of a single agreement.

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[13] See page ____, *ante*.*

* See typed opinion page 9, *ante*.

Moreover, the policy goals of section 1090 support the rule that public officers "are denied the right to make contracts in their official capacity with themselves *or to become interested in contracts thus made.*" (Stockton Plumbing & Supply Co. v. Wheeler (1924) 68 Cal.App. 592, 602.) (Italics added.) We have recognized an exception to this rule where the conflict arose after the award of the contract, but this exception turns upon the fact that no earlier agreement—express or implied—existed between the official and the entity contracting directly with the city. (City of Oakland v. California Const. Co. (1940) 15 Cal.2d 573, 577 [councilman accepted employment with defendant construction company *after* council awarded contract to defendant and had no interest in the contract at the time it was awarded]; Escondido Lumber, etc. v. Baldwin (1906) 2 Cal.App 606, 608 [contractor who received construction contract from school district purchased—without previous arrangement or agreement—materials from corporation in which a school district trustee was a stockholder and officer]; see, also, People v. Deysher (1934) 2 Cal.2d 141, 146.)

Section 1090 forbids city officers such as Call from being "financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." The proscribed interest certainly includes any *direct* interest, such as that involved when an officer enters directly into a contract with the body of which he is a member. (Osburn v. Stone (1915) 170 Cal. 480; Berka v. Woodward (1899) 125 Cal. 119; Co. of Shasta v. Moody (1928) 90 Cal.App. 519.) California courts have also consistently voided such contracts where the public officer was found to have an *indirect* interest therein. In Moody v. Shuffleton (1928) 203 Cal. 100, for example, a county supervisor sold his printing business to his son and took a promissory note secured by a chattel mortgage on the business. Because the business helped to secure the value of the official's mortgage, we held that a conflict existed when printing contracts were awarded to the son. It is also clear that where the public officer is a stockholder in a corporation mak-

ing such a contract, the contract will be adjudged void under the conflict of interest statutes.[14]

As part of the transaction at issue, Call sold property to the city, using IGC as a conduit. Whether we regard his interest as direct or indirect, it is clearly a pecuniary interest forbidden by section 1090 and by the decisions applying conflict-of-interest rules generally. Neither the absence of actual fraud nor the possibility of a "good faith" mistake on Call's part can affect the conclusion that this contract violates section 1090 and is therefore void.[15] (Stigall v. City of Taft (1962) 58 Cal.2d 565, 568-569; San Diego v. S.D. & L.A. R.R. Co. (1872) 44 Cal. 106, 113; City of Imperial Beach v. Bailey (1980) 103 Cal.App.3d 191, 197; Fraser-Yamor Agency, Inc. v. Co. of Del Norte (1977) 68 Cal.App.3d 201, 215; Schaeffer v. Berinstein (1956) 140 Cal.App.2d 278, 290; Hobbs, Wall & Co. v. Moran (1930) 109 Cal.App. 316, 319.)[16]

II

Having established Call's violation of section 1090, we turn to the primary issue presented by this case: what is the appropriate remedy where a fully executed and performed contract has been found to violate section 1090?[17]

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[14] See Finch v. Riverside & A. Ry. (1891) 87 Cal. 597 (city trustee votes to approve street car franchise, said trustee being at the same time a subscriber to stock in the street car company); Miller v. City of Martinez (1938) 28 Cal.App.2d 364 (shareholder and employee of oil company was also a public officer).

[15] California courts have generally held that a contract in which a public officer is interested is *void*, not merely voidable. (People v. Deysher (1934) 2 Cal.2d 141, 146; *Berka, supra*, at p. 27; *Stockton Plumbing, supra*, at p. 601.)

[16] See, also, Kennedy & Beck, *Interest of Public Officers in Contracts Prohibited by Law* (1955) 28 So.Cal.L.Rev. 335, 340; Kaufmann & Widiss, *The California Conflict of Interest Laws* (1963) 36 So.Cal.L.Rev. 186, 196.

[17] Injunctive relief will lie if the contract has not been performed.

The trial court's solution—allowing the city to retain the land and, at the same time, recover the $258,000 plus interest from the Calls[18]—finds ample support in California case law. Clearly, no recovery could be had or goods delivered or services rendered to the city or public agency pursuant to a contract violative of section 1090 or similar conflict-of-interest statutes. (Moody v. Shuffleton, *supra*, 203 Cal. 100; Berka v. Woodward, *supra*, 125 Cal. at pp. 121, 123-124; Domingos v. Supervisors of Sacramento (1877) 51 Cal. 608; Salada Beach etc. Dist. v. Anderson (1942) 50 Cal.App.2d 306, 310; Miller v. City of Martinez, *supra*, 28 Cal.App.2d at pp. 370-371; Hobbs, Wall & Co. v. Moran, *supra*, 109 Cal.App. at p. 320; Co. of Shasta v. Moody, *supra*, 90 Cal.App. at pp. 523-525.)

Moreover, the city or agency is entitled to recover any consideration which it has paid, without restoring the benefits received under the contract. *Berka, supra*, at pp. 123-124; *Miller, supra*, at p. 370; *Co. of Shasta, supra*, at pp. 523-524.) Confronting this issue directly, the court in *Co. of Shasta* rejected the appellant's contention that the county was estopped from maintaining an action against him without first restoring or offering to restore to him the benefits it received from him under the contract. The court reasoned that because the contracts were void under the statute[19] and against public policy, "there is no ground for any equitable considerations, presumptions, or estoppels. . . . The contracts in the case at

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(See Moody v. Shuffleton, *supra*, 203 Cal. at p. 100, 105; Berka v. Woodward, *supra*, 125 Cal. at pp. 121, 129; Hobbs, Wall & Co. v. Moran, *supra*, 109 Cal.App. at pp. 317, 321.)

[18] This solution assumes that the $258,000 paid to the Calls by IGC ultimately represented a sum expended by the city itself. This seems entirely reasonable. Regardless of the Calls' Involvement, the $600,000 plan committed IGC to transferring $600,000 to the city, either in cash or in acquired property.

[19] Section 4322 of the Political Code, since repealed. All conflict-of-interest cases cited in this opinion involve section 1090 or statutes which are analogous or similar.

bar, as we have seen, *are against the express prohibition of the law and courts will not entertain any rights growing out of such a contract, or permit a recovery upon a quantum meruit or quantum valebat.*" (*Co. of Shasta, supra,* at pp. 523-524, citing *Berka, supra.* See, also, Salada Beach etc. Dist. v. Anderson, *supra,* 50 Cal.App.2d 306.[20])

The trial court's remedy is thus consistent with a long, clearly established line of cases. Admittedly, the resulting forfeiture seems harsh under the facts of this case. Call was found not to have committed fraud, actual or constructive, or to have conspired to violate section 1090. Indeed, he did seek and obtain advice from the city attorney on certain occasions, and he did follow the specific advice he received. No evidence in the record supports an inference that Call actually initiated the entire transaction, and there is conflicting evidence as to the difference between the fair market value of the parcel and the amount IGC actually paid for it pursuant to the $600,000 plan.

However, examination of the goals and policy concerns underlying section 1090 convinces us of the logic and reasonableness of the trial court's solution. In San Diego v. S.D. & L.A. R.R. Co. (1872) 44 Cal. 106, we recognized the conflict-of-interest statutes' origins in the general principle that "no man can faithfully serve two masters whose interests are or may be in conflict": "The law, therefore, will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity. . . . For even if the honesty of the agency is unquestioned . . . yet the principal has in fact bargained for the exercise of all

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[20] In *Salada Beach,* a director of a public utility district purchased bonds issued by the district. This transaction violated the applicable conflict-of-interest statute, which provided that a director shall not be interested in any contract awarded by the board of directors, and was therefore void. The former director contended that the district could not retain the benefits received from the transaction. Relying upon *Co. of Shasta* and upon the policy considerations underlying the statute, the court held that the district was not obligated to pay the former director the value of the bonds. (50 Cal.App.2d at p. 310.)

the skill, ability and industry of the agent, and he is entitled to demand the exertion of all this in his own favor." (44 Cal. at p. 113.) We reiterated this rationale more recently in Stigall v. City of Taft (1962) 58 Cal.2d 565: "The instant statutes [§ 1090 et seq.] are concerned with *any* interest, other than perhaps a remote or minimal interest, which would prevent the officials from exercising absolute loyalty and undivided allegiance to the best interests of the city." (58 Cal.2d at p. 569. See, also, City of Imperial Beach v. Bailey (1980) 103 Cal.App.3d 191, 196; City Council v. McKinley (1978) 80 Cal.App.3d 204, 212; People v. Darby (1952) 114 Cal.App.2d 412, 426; *Miller, supra*, 28 Cal.App.2d at p. 366; Hobbs, Wall & Co., *supra*, 109 Cal.App. at p. 319.)

In *Stigall* we relied in part on the reasoning of the United States Supreme Court on a federal penal statute under which a contract was declared to be unenforceable because of a conflict of interest: "The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." *Stigall, supra*, 58 Cal.2d at p. 570, *quoting* United States v. Mississippi Valley Generating Co. (1961) 364 U.S. 520.) Implicit in this reasoning is the assumption that the purpose of such statutes is "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." *(City of Imperial Beach, supra*, 103 Cal.App.3d at p. 197 [construing § 109].)

It follows from the goals of eliminating temptation, avoiding the appearance of impropriety, and assuring the city of the officer's undivided and uncompromised allegiance that the vio-

lation of section 1090 cannot turn on the question of whether actual fraud or dishonesty was involved.[21] Nor is an actual *loss* to the city or public agency necessary for a section 1090 violation. In *Stigall*, for example, a city councilman had a financial interest in a plumbing company which submitted the *lowest* bids for a municipal contract. Taxpayers sued to have the contracts declared void. They did not allege "actual improprieties," nor did they contend that the contract was unfair, unjust, or not beneficial to the city. (58 Cal.2d at p. 568.) On these facts, we nonetheless concluded that the contract violated section 1090, reasoning that the "object of these enactments is to remove or limit the *possibility* of any personal influence, either directly or indirectly which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud of dishonest conduct." (*Id.* at p. 569. See also, San Diego v. S.D. & L.A. R.R. Co., *supra*, 44 Cal. at p. 13; *City of Imperial Beach*, *supra*, 103 Cal.App.3d at p.197; *Fraser-Yamor Agency, Inc.*, *supra*, 68 Cal.App.3d at p. 215; Schaeffer v. Berinstein (1956) 140 Cal.App.2d 278, 290.)[22] And in *Shuffleton*, *supra*, we observed that "it matters not how fair upon the face of it the contract may be, the law will not suffer [the official] to occupy a position so equivocal and so fraught with temptation." (23 Cal. at p. 105.)

In short, if the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity. Nor does the fact that the forbidden contract would be more advantageous to the public

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[21] See *Kennedy & Beck*, *supra*, at page 340; *Kaufmann*, *supra*, at page 196.

[22] "[N]or is it necessary to show actual fraud, dishonesty, or loss to invalidate the transaction. The purpose . . . is to remove all indirect interest of an interested officer as well as to discourage deliberate dishonesty. [Citations.] It is not the character of the contract itself, but the manner in which it is created, that renders it violative of sound public policy." (Berinstein, *supra*, 140 Cal.App.2d at p. 290.)

entity than others might be have any bearing upon the question of its validity. (Capron v. Hitchcock (1893) 98 Cal. 427.)

Moreover, California courts have consistently held that the public officer cannot escape liabiity for a section 1090 violation merely by abstaining from voting or participating in discussions or negotiations.[23] *(Stigall, supra,* 58 Cal.2d at pp. 570-571; *Hobbs, Wall & Co., supra,* 109 Cal.App. at p. 319.) Mere membership on the board or council establishes the presumption that the officer participated in the forbidden transaction or influenced other members of the council. *(Stigall, id.; Fraser-Yamor Agency, Inc., supra,* 68 Cal.App.3d at pp. 211, 215; *Hobbs, Wall & Co., supra,*109 Cal.App. at p. 319. See, also, *Kennedy & Beck, supra,* at pp. 340-341; *Kaufmann, supra,* at p. 196.) Similarly, the full disclosure of an interest by an officer is also immaterial,[24] as disclosure does not guarantee an absence of influence. To the contrary, it has been suggested that knowledge of a fellow officer's interest may lead other officers to favor an award which would benefit him.[25]

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[23] See, e.g., *City of Imperial Beach, supra,* where a councilwoman possessed an interest in a concession stand on a municipal pier. The question in the action by the city for declaratory relief was whether the city council could renew or extend a contract it had with the concession operators. Because the city council would have to approve any such renewal and the contract rates, the court held that it would be prohibited under section 1090, even if the councilwoman abstained from voting: "It is not her participation in the voting which constitutes the conflict of interest, but her potential to do so." (103 Cal.App.3d at p. 195.)

[24] See *Berka, supra,* 125 Cal. at page 129; *Stockton Plumbing & Supply Co., supra,* 68 Cal.App. at page 603.

[25] *Kaufmann, supra,* at page 196. We recognize the difficulty faced by a public officer who—for reasons beyond his control—finds himself in a potential conflict-of-interest situation. In addition to fully disclosing the interest, abstaining from relevant votes and discussions, seeking the advice of the city attorney, and refraining from taking advantage of the situation, it has been suggested that he could divest

The case law supports strict enforcement of conflict-of-interest statutes. Mitigating factors—such as Call's disclosure of his interest in the transaction, and the absence of fraud—cannot shield Call from liability.[26] Moreover, the trial court's remedy—allowing the city to keep the land and imposing a money judgment against the Calls—is consistent with California law and with the primary policy concern that every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict-of-interest situations scrupulously.

On the other hand, the forfeiture in this case is undeniably harsh in light of the absence of fraud and Call's partial reliance upon advice given by the city attorney. Also, beyond the effect

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himself of the interest (prior to official action), or, in some instances, actually resign from his office. (People v. Darby, *supra*, 114 Cal.App.2d at p. 426.) Resignation from office does not, however, appear to be a viable alternative; indeed, it may be counter to the public interest in retaining competent public officers. In the instant case, Call was under no compulsion to negotiate with or sell the parcel to IGC. He could have simply informed IGC that to sell his land to the city, using IGC as a conduit, would place him in a conflict-of-interest situation; he would thereby have avoided any interaction with IGC which might implicate him in the $600,000 plan. If, after IGC's performance of the $600,000 plan, the city still wished to acquire the Calls' parcel, it could have done so through eminent domain.

[26] We note, also, that this case does not confront us with a purely innocent or unknowing violation of the statute. Knowing that the city would be purchasing the property, Call negotiated for the $258,000 selling price which the evidence suggested may be well above fair market value. He did vote on some of the relevant matters, and his consultations with the city attorney and abstinence from certain votes appear to satisfy niceties of form rather than the substantial ethical demands of his public office. Moreover, Call insisted upon the easement, thereby considerably diminishing the value of the land which he knew was to be purchased by the city.

of the trial court's decision on the Calls, it has been suggested that such a harsh prohibition of financial interest may frustrate the strong public policy goal of attracting competent individuals to public service positions. This argument assumes—not unreasonably, perhaps—that some of the most qualified potential civic leaders are usually those engaged in business or in the professions, and that currently many such persons otherwise qualified and willing to serve are discouraged from serving because of the possibility of public disgrace, criminal penalties, and harsh forfeitures such as that imposed upon the Calls.[27] Furthermore, the public has an interest in securing the best possible contractual arrangement for goods or services, even if it is an arrangement involving a public official.

We have considered the possibility of an intermediate solution which—though less severe than that imposed by the trial court—would nonetheless discourage public officials from becoming involved in potential conflict-of-interest situations. One approach would allow the city to retain the park land while allowing the Calls to retain only the fair market value of the land *at the time of its conveyance to IGC*, plus interest. The city's outlay would thus be equivalent to what it would have paid the Calls in an eminent domain proceeding. Arguably, this remedy would be consistent with the trial court's finding that there was no fraud or conspiracy to violate section 1090.

Of course, such an approach would involve difficult valuation problems. As the facts in this case suggest, appraisers' calculations often vary dramatically. Should the Calls' parcel be appraised with or without the cross and easement? Obviously, the easement would reduce the fair market value of the property considerably, perhaps rendering it unsuitable for development at the best and highest uses allowed under R3HC zoning. Should the fair market value of the parcel reflect the changes in

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[27] See Note, *Conflict of Interest in Public Contracts in California* (1956) 44 Cal.L.Rev. 355; Note, *Temptation and Tradition in the California School Board* (1952) 5 Stan.L.Rev. 61.

value attributable to IGC's development? That development may, itself, be implicated in the section 1090 violation at issue in this case.

However difficult the valuation problems, courts are qualified and experienced in such matters. A more serious problem with this approach is that it really provides only a weak incentive for public officials to avoid such situations. If they enter into such arrangements and "get caught" in the section 1090 violation, this remedy would leave them as well off as they were prior to the transaction; if the violation goes unnoticed or unchallenged, they would profit from the deal. Certainly the deterrent effect of the trial court's solution is greater, effectively implementing the conflict-of-interest statutes' strict public policy goals.

This intermediate approach also assumes, in effect, that in situations such as this the targeted "wrong" is the loss to the city or the councilman's undue profit—i.e., the amount Call received in excess of a given fair market value. There is indeed substantial evidence that $258,000 was higher than the fair market value of the 1.1-acre parcel, especially in light of the easement for maintenance of the cross. However, our review of the case law construing and applying section 1090 and similar statutes indicates that the contract here would have violated section 1090 even if Call's return had *not* been greater than the fair market value. Section 1090 prohibits *any* financial interest, not merely an undue profit. *If the parcel had been sold at the lowest appraisal level ($63,800) or for a price actually lower than the fair market value, Call would nonetheless have violated section 1090.* The prophylactic function of the statute is to prevent conflicts of interest from occurring—not simply to recoup losses or force violators to disgorge profits.

Theoretically, a range off possibilities less harsh than the forfeiture imposed by the trial court could be devised. For example, the city could be allowed to retain the land and recover the $258,000, *minus the amount the Calls actually paid* for the land in 1970. This approach would circumvent

thorny valuation problems (the Calls' purchase price is an easily ascertainable sum), provide some incentive for officials to avoid conflict-of-interest situations, and still allow the Calls to recoup most of their out-of-pocket losses. However, like the fair market value approach outlined above, this out-of-pocket-loss solution also implies that undue profit and loss to the city are the primary concerns of section 1090, and that full disclosure and the absence of a finding of fraud are key considerations in determining liability under section 1090.

The facts of this case represent but one of endless permutations generated by the basic conflict-of-interest situation, and a different remedy could be tailored for each. The trial court's approach adheres to precedent established by a long line of California cases. It is consistent with the policy of strict enforcement of conflict-of-interest statutes, it provides a strong disincentive for those officers who might be tempted to take personal advantage of their public offices, and it is a bright-line remedy which may be appropriate in many different factual situations. As we have seen, *civil liability* under section 1090 is not affected by the presence or absence of fraud, by the official's good faith or disclosure of interest, or by his nonparticipation in voting; nor should these considerations determine the civil remedy.[28] For these reasons, and because of the significant public policy goals which mandate strict enforcement of conflict-of-interest statutes such as section 1090, we conclude that the remedy applied by the trial court was justified, supported by both California case law and public policy.

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[28] Where the official commits fraud or conspires to violate section 1090, he will, of course, also be subject to criminal sanctions under section 1097: "Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales . . . is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the state prison, and is forever disqualified from holding any office in this state."

III

Plaintiffs, on their appeal, contend that the trial court erred in failing to hold the corporate defendants liable to the city. They argue, first, that the corporate defendants acted as the city's agents in the performance of the contract embodied in the $600,000 plan, and that they breached their duties as agents in conveying encumbered land to the city. Alternatively, it is argued that the corporate defendants breached their duties as trustees to the city. These theories are answered by the trial court's conclusion that "[w]ith respect to the $600,000 plan, and the satisfaction of its obligations thereunder, IGC was neither the agent nor the trustee of the City of Albany." Substantial evidence supports the underlying finding that the $600,000 plan did not vest in the city any right or power to control the real property acquisitions of IGC in its performance of the plan. Nor did the city attempt to control any act of IGC relating to the real property at issue. The corporate defendants are therefore not liable to the city on either theory.

the judgment is affirmed.

Kaus, J.

WE CONCUR;
BROUSSARD, J.
REYNOSO, J.
GRODIN, J.
LUCAS, J.

THOMSON et al. v. *CALL et al.*
S.F. 24693

CONCURRING AND DISSENTING OPINION BY MOSK, J.

I concur in the judgment against Hubert F. Call, but I cannot agree that the corporate defendant is free of liability. The evidence is clearly to the contrary.

The trail court observed in its memorandum decision: "IGC does appear to have been guilty of one breach of its agreement . . . [with the City. . . . Though IGC was motivated solely by a desire to obtain a building permit and to protectits development, . . . it recognized that the City . . . was interested in making a public park at the top of the hill. IGC therefore used that as its inducement to the City as, for example, in the letter of November 3, 1972 offering 'to make a major effort to preserve the Albany Hill top for public use,' and promising the City's unique, superb and useful view park or the public enjoyment.' The sales agreement with Call . . . called for title free and clear of all liens, encumbrances, easements, et cetera. Notwithstanding this, . . . IGC consented to a demand of Call . . . that title be taken subject to . . . an unrestricted easement of access by the Albany Lions Club to and for maintenance of . . . [the] . . . cross which had been erected on the Call property.

"The President . . . of IGC [Wilson] testified that Call was allowed to impose the burden of the easement because IGC didn't care what restrictions might be placed upon the property as long as they did not constitute a potential threat to the development of IGC's property. . . . Allowing the property to be so encumbered can hardly be said to be consistent with 'a major effort to save and preserve the Albany Hill top for public use,' given the legal and practical complications thus entailed."

The IGC contract with the city obligated it to convey fair value to the city in the form of land suitable for use as a public park. The 1.1-acre parcel it acquired from the Calls and conveyed to the city, through Cebert, represents less than fair

value because of the extent to which its worth has been diminished by the cross and the easement. The easement protects the location and existence of the cross, which renders the land unsuitable for use as a park because of the constitutional proscriptions precluding the display of a religious symbol on public property. (Fox v. City of Los Angeles (1978) 22 Cal.3d 792, 797.)

It was IGC that allowed the land to be burdened with the easement before conveying the land to the city pursuant to the contract, although it should have been obvious that the easement negated the city's purpose in acquisition. The trial court recognized that result in its memorandum decision: "With the cross and unrestricted easement on the property . . . the property was virtually undevelopable and therefore of virtually no commercial value." And, of course, the perpetual religious symbol rendered the property legally unsuitable for park or other public purposes Nevertheless the court exonerated the corporation off liability to the city under the state of the pleadings; a separate lawsuit was suggested as a remedy for the city.

That result allows IGC to escape liability in this proceeding by an unduly narrow interpretation of the complaint. As the Court of Appeal held, deferment to future litigation rather than adjudication of liability in this action is neither in the public interest nor serves judicial economy. I would direct, as did the Court of Appeal, that on remand the plaintiffs should be permitted to amend their complaint to seek appropriate damages against IGC for breach off contract. Recovery would appear to be certain, with only the amount of damages to be determined.

MOSK, J.

I CONCUR:

BIRD, C.J.